Tan Geok Lan (f) v La Kuan @ Lian Kuan

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–32 OF 1997
MOKHTAR SIDIN, MOHD SAARI AND ABDUL AZIZ MOHAMAD JJCA
9 JUNE 2003

Civil Procedure *— Judgment — Consent judgment — Plaintiffs' counsel attempted to record consent judgment — Trial judge refused to record consent judgment due to objection from defendant — Whether there was consent judgment in full force*

The first plaintiff ('the appellant') and the second plaintiff were the joint owner of a piece of land held under EMR 2155 for Lot No 1189 in the Mukim and District of Klang ('the said land'). On 17 December 1974, the plaintiffs entered into a joint venture agreement ('JVA') with the defendant ('respondent') whereby the respondent agreed to develop the said land into a housing estate. With the proposed housing project in mind, the appellant advanced payments in respect of conversion fee, drainage and irrigation fee, assessment and quit rent. However, the respondent failed to develop the said land. Later, upon termination of JVA by the plaintiffs and upon obtaining consent from the respondent, the said land was sold to a third party for RM550,000. After the sale, the plaintiffs sued the respondent for breach of contract. From the appeal record, it was noted that on 25 January 1996, counsel for the plaintiffs informed the High Court that the parties had reached a settlement. The terms of settlement were embodied in encl 37, which provided, inter alia, that the parties had agreed to be bound by the statement of facts as deposed to by George Proctor, the solicitor acting for all parties in the sale and purchase of the said land and to enter judgment accordingly on the issues of whether: (a) payments for conversion fee, drainage and irrigation fee and quit rent had been reimbursed to the appellant from the sale proceeds of the said land; and (b) the appellant had at the time of the execution of the sale and purchase agreement in respect of the sale of the said land agreed with the respondent to accept her option of the proceeds of sale, in full and final settlement of all claims. After encl 37 was tendered, the case was adjourned to 1 April 1996 to give time for George Proctor to file the affidavit referred to therein. However, on 1 April 1996, dispute arose as to whether encl 37 and the affidavit were binding on the parties. The case was further adjourned to 1 November 1996 for parties to make submission. On 1 November 1996, after hearing submission of both parties, the learned High Court judge made the following finding: '... Now, when enc 37 was tendered to me on 25 January 1996 I did not make any order at all, as the matter was adjourned for mention to another date to enable Mr G Proctor to file his affidavit. As such it is my considered opinion that there was no consent order made at all. Thus after hearing the submission by both counsel on 1 November 1996, I made a ruling on 27 November 1996 for this case to proceed to trial and for both parties to call their respective witnesses ...'. This was the appellant's appeal. The second plaintiff was not a party to this appeal.

A The grounds of the appeal were essentially that the High Court judge had erred in departing from the consent judgment. Hence, the issue for determination in this appeal was whether there was a consent judgment in full force as alleged by the appellant.

B **Held**, dismissing the appeal:

(1) (per **Mokhtar Sidin JCA**) The respondent and his present counsel did not at any time agree to encl 37 to be a settlement, much less for it to be recorded as a consent judgment. The learned High Court judge, after hearing the parties refused to record encl 37 as a consent judgment had ordered a full trial. The C appellant's appeal was against that decision. As such, for all intents and purposes, there was no consent judgment being recorded. It was wrong for the plaintiffs' counsel to refer to encl 37 as a consent judgment as encl 37 was nothing more than a proposed settlement by the plaintiffs which was never accepted by D the respondent (see p 217F–G); *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381 and *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705 distinguished.

(2) (per **Mokhtar Sidin JCA**) In the instant appeal, the plaintiffs' counsel attempted to have encl 37 recorded as a consent judgment but on the objection of the respondent, the learned trial E judge refused to record encl 37 as consent judgment and instead made a ruling that there would be a full trial. The appellant could not now come to the Court of Appeal to insist that the High Court record encl 37 as consent judgment. The learned High Court judge was within her right in refusing to record encl 37 as consent F judgment. In fact, the learned judge would be in error if she had acceded to the plaintiffs' counsel's request to have encl 37 recorded as consent judgment when there were sufficient evidence to show that the respondent and his counsel objected to it. The learned High Court judge was right when she said that this was an attempt by the plaintiffs' counsel to dictate the terms and G procedure of the trial (see pp 220G–221A); *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486 followed.

(3) (per **Mohd Saari JCA**) From the notes of proceeding in the instant case, there was nothing to suggest that the terms of settlement in encl 37 were recorded and pronounced by the High H Court (see p 222G–H); *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705 distinguished.

[Bahasa Malaysia summary

I Plaintif pertama ('perayu') dan plaintif kedua adalah pemilik bersama sebidang tanah yang dipegang di bawah EMR 2155 untuk Lot No 1189 dalam Mukim dan Daerah Klang ('tanah tersebut'). Pada 17 Disember 1974, plaintif-plaintif telah memasuki satu perjanjian

usahasama ('JVA tersebut') dengan defendan ('responden') di mana responden telah bersetuju untuk membangunkan tanah tersebut menjadi satu kawasan perumahan. Dengan cadangan projek perumahan tersebut, perayu telah mendahulukan pembayaran berhubung yuran penukaran, perparitan dan pengairan, taksiran dan cukai tahunan. Bagaimanapun, responden telah gagal untuk membangunkan tanah tersebut. Berikutan itu, selepas JVA tersebut ditamatkan oleh plaintif-plaintif dan setelah memperoleh persetujuan daripada responden, tanah tersebut telah dijual kepada pihak ketiga untuk RM550,000. Selepas jualan tersebut, plaintif-plaintif telah menyaman responden kerana perlanggaran kontrak. Berdasarkan rekod rayuan, ia menyatakan bahawa pada 25 Januari 1996, peguam bagi pihak plaintif-plaintif telah memaklumkan Mahkamah Tinggi bahawa pihak-pihak tersebut telah mencapai satu penyelesaian. Terma-terma penyelesaian tersebut terkandung dalam lampiran 37, yang memperuntukkan, antara lain, bahawa pihak-pihak tersebut telah bersetuju untuk terikat dengan pernyataan fakta-fakta sebagaimana yang dideposkan oleh George Proctor, peguamcara yang bertindak bagi pihak semua pihak dalam jual beli tanah tersebut dan untuk memasuki penghakiman dengan sewajarnya berhubung persoalan-persoalan sama ada: (a) bayaran-bayaran untuk yuran penukaran, yuran perparitan dan pengairan dan cukai tahunan telah dibayar balik kepada perayu dari hasil jual beli tanah tersebut; dan (b) perayu telah pada masa perlaksanaan jual beli perjanjian berhubung jualan tanah tersebut telah bersetuju dengan responden untuk menerima pilihan hasil jualan beliau, secara penyelesaian penuh dan muktamad untuk semua tuntutan. Setelah lampiran 37 ditenderkan, kes tersebut telah ditangguhkan ke 1 April 1996 untuk memberi masa kepada George Proctor untuk memfailkan afidavit yang dirujuk di dalamnya. Namun begitu, pada 1 April 1996, pertikaian telah timbul tentang lampiran 37 dan afidavit tersebut mengikat pihak-pihak tersebut. Kes tersebut telah ditangguhkan lagi ke 1 November 1996 untuk pihak-pihak membuat penghujahan. Pada 1 November 1996, setelah mendengar hujah kedua-dua belah pihak, hakim Mahkamah Tinggi yang bijaksana telah membuat penemuan berikut: '... Now, when enc 37 was tendered to me on 25 January 1996 I did not make any order at all, as the matter was adjourned for mention to another date to enable Mr G Proctor to file his affidavit. As such it is my considered opinion that there was no consent order made at all. Thus after hearing the submission by both counsel on 1 November 1996, I made a ruling on 27 November 1996 for this case to proceed to trial and for both parties to call their respective witnesses ...'. Ini adalah rayuan perayu. Plaintif kedua bukan pihak kepada rayuan ini. Alasan-alasan rayuan pada dasarnya adalah bahawa hakim Mahkamah Tinggi telah terkhilaf kerana menyimpang dari penghakiman persetujuan tersebut. Justeru itu, persoalan yang perlu ditentukan dalam rayuan ini adalah sama ada terdapat satu penghakiman persetujuan yang berkuatkuasa sebagaimana yang dikatakan oleh perayu.

A B C D E F G H I

Diputuskan, menolak rayuan tersebut:

(1) (oleh **Mokhtar Sidin JCA**) Responden dan peguam beliau sekarang tidak pada bila-bila masa bersetuju dengan lampiran 37 sebagai satu penyelesaian, sama sekali bukan untuk direkodkan sebagai satu penghakiman persetujuan. Hakim Mahkamah Tinggi yang bijaksana, selepas mendengar kedua-dua pihak enggan merekodkan lampiran 37 sebagai satu penghakiman persetujuan telah memerintahkan satu perbicaraan penuh. Rayuan perayu-perayu adalah terhadap keputusan tersebut. Oleh itu, untuk apa-apa niat dan tujuan, tiada penghakiman persetujuan yang telah direkodkan. Ia adalah salah untuk peguam plaintif-plaintif merujuk kepada lampiran 37 sebagai satu penghakiman persetujuan kerana lampiran 37 tidak lebih daripada satu cadangan penyelesaian oleh plaintif-plaintif yang tidak pernah diterima oleh responden (lihat ms 217F–G); *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381 dan *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705 dibeza.

(2) (oleh **Mokhtar Sidin JCA**) Dalam rayuan semasa, peguam plaintif-plaintif telah cuba untuk merekodkan lampiran 37 sebagai satu penghakiman persetujuan tetapi atas bantahan responden, hakim perbicaraan yang bijaksana telah enggan untuk merekodkan lampiran 37 sebagai satu penghakiman persetujuan dan sebaliknya membuat satu keputusan bahawa perlu ada satu perbicaraan penuh. Perayu tidak boleh sekarang hadir di Mahkamah Rayuan untuk mendesak bahawa Mahkamah Tinggi merekodkan lampiran 37 sebagai penghakiman persetujuan. Hakim Mahkamah Tinggi yang bijaksana mempunyai hak untuk tidak merekodkan lampiran 37 sebagai penghakiman persetujuan. Walhal, hakim yang bijaksana akan terkhilaf jika beliau bersetuju kepada permintaan peguam plaintif-plaintif untuk merekodkan lampiran 37 sebagai penghakiman persetujuan bila terdapat keterangan yang mencukupi untuk menunjukkan bahawa responden dan peguamnya membantah terhadapnya. Hakim Mahkamah Tinggi yang bijaksana adalah betul apabila beliau mengatakan bahawa ini merupakan percubaan oleh peguam plaintif-plaintif untuk mengimlakkan terma-terma dan prosedur perbicaraan tersebut (lihat ms 220G–221A); *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486 diikut.

(3) (oleh **Mohd Saari JCA**) Berdasarkan nota-nota prosiding dalam kes semasa, tiada apa-apa yang mencadangkan bahawa terma-terma penyelesaian dalam lampiran 37 telah direkodkan dan diputuskan oleh Mahkamah Tinggi (lihat ms 222G–H); *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705 dibeza.]

Notes

For cases on consent judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2497–2502.

Cases referred to

Ashmore v Corp of Lloyd's [1992] 2 All ER 486 (folld)
Leow Seng Huat v Low Mui Yein [1996] 5 MLJ 381 (distd)
Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 MLJ 705 (distd)

Appeal from: Suit No F233 of 1983 (High Court, Kuala Lumpur)

MS Murthi (*Murthi & Partners*) for the appellant/plaintiffs.
A Murali (*K Kulasekar & Assoc*) for the respondent/defendant.

Mokhtar Sidin JCA: In the court below, the appellant was the first plaintiff and the respondent was the defendant. The second plaintiff is not a party to the present appeal. I will refer to the parties as they were in the High Court.

According to the amended statement of claim, both the plaintiffs own in equal share a piece of land held under EMR No 2155 for Lot No 1189 in the Mukim and the District of Klang (hereinafter referred to as 'the said land'). Some time on 17 December 1974, both plaintiffs entered into a written joint venture agreement (hereinafter referred to as 'the agreement') with the defendant to develop the said land into a housing estate. Under the said agreement the second plaintiff was to sell $^1/_2$ of his undivided half ($^1/_2$) share of the said land to the defendant for RM26,437. By virtue of that, the defendant became the beneficial owner of an undivided $^1/_4$ share in the said land while the first plaintiff remained the owner of an undivided half ($^1/_2$) share of the said land. The title to the said land was then handed over to the defendant in order to facilitate him to carry out the obligations under cl 5 of the agreement:

(a) to apply for conversion of the said Land from agricultural to housing and to pay all the necessary fees for such conversion;

(b) to fill the said Land to a height in accordance with the Town Council stipulations and regulations;

(c) to cause or to take such steps to have the said Land sub-divided and to forward the sub-divisional plans to the Collector of Land Revenue, Klang and on approval being obtained to sub-divide to surrender the Title of the said Land to the Collector of Land Revenue including the payment of all such necessary fees for the said sub-division;

(d) to prepare plans for the construction of single storey terrace houses on the said Land and to construct the houses to a minimum size of 840 sq feet (20' x 42');

(e) upon the completion of the houses the apportionment or allotment was agreed as follows:
seventy (70%) for the defendant;
thirty (30%) for the plaintiffs.

(f) all odd lots after sub-division shall be allotted in the same manner as provided in sub-clause 6 of the said Agreement;

(g) the said defendant shall complete the construction of the houses within a period of three (3) years from the date of the said Agreement;

(h) sale prices of the houses shall be fixed jointly by the plaintiffs and the defendant.

It was not disputed that the defendant was not able to carry out his obligations under the said agreement within the stipulated period and as a result of that the plaintiffs through their solicitors, Messrs KS Choo & Company gave notice in writing dated 10 June 1980 to terminate the agreement and demanded the return of the land title. It was also not disputed that at the time when the notice of termination was given, the first plaintiff, at the request of the defendant, had paid the sum of RM17,408 as conversion fees and RM9,000 for drainage and irrigation fees which is the central issue of this appeal.

Upon receiving that notice, the defendant approached the plaintiffs and requested that the said agreement be vacated and in its place proposed a new joint venture agreement. The plaintiffs indicated to the defendant that they would agree to a new joint venture agreement if certain terms be included in the new joint venture agreement which amongst others that the defendant would reimburse the first plaintiff the sum of RM26,408 which was paid by the first plaintiff for conversion, drainage and irrigation fees, the sum of RM27,619.75 paid by the plaintiffs as quit rent and that the defendant deposited the sum of RM60,000 as a security for the completion of the new joint venture agreement. Apparently, the defendant did not agree to those proposals and the new joint venture agreement never came into being. As a result of that breakdown the solicitors for the plaintiffs issued a notice of demand dated 9 February 1983 claiming amongst others the reimbursement of the conversion, drainage and irrigation fees, the defendant's share of the quit rent and assessment already paid by the plaintiffs.

On 9 September 1988, the said land was sold to a third party for the sum of RM550,000. It is common ground that the sale was agreed upon by the plaintiffs and the defendant being the joint owner of the said land. The proceeds of the sale were to be distributed between the plaintiffs and the defendant in accordance with their shareholding as I have stated above.

After the sale the plaintiffs filed their writ and the statement of claim seeking the following:

(i) a declaration that the said agreement had been rescinded;

(ii) damages for breach of the said agreement;

(iii) special damages for the sum of RM47,366.60 (this figure had been increased from the sum of RM27,619.75 due to the payment of quit rent and assessment for the years 1982 to 1988); and

(iv) interest.

From the notes of proceedings and the judgment of the learned judge, the defendant had filed his statement of defence. I have gone through the record of appeal but I could not find the statement of defence which, according to the Rules of the Court of Appeal, should be enclosed in the record. It is clear to me that the solicitors for the plaintiffs had prepared the record without due diligence. There is another document which was referred to by the

learned judge in her judgment and by the counsel of both parties in the course of their submissions which could not be found in the record. I will refer to this document later in my judgment.

The first plaintiff's memorandum of appeal stated the following grounds:

1. The learned judge erred in law in allowing the respondent to depart from the agreed terms and the manner of resolving the issue of whether the appellant has been paid the conversion fee, drainage and irrigation fee and the quit rent from the proceeds of the sale received from Palm Grove Development Sdn Bhd.
2. The learned judge erred in law in allowing the respondent to depart from the agreed terms and the manner of resolving the issue of whether the appellant has agreed to accept her portion of proceeds of sale in full and final settlement of all claims against the respondent.

Although the memorandum of appeal gave the grounds for appeal as stated above, it is clear to me following the submissions of the learned counsel for the first plaintiff, that the grievances of the first plaintiff was that the learned trial judge had erred in departing from the consent judgment. It was puzzling to me because I could not trace any consent judgment in the appeal record. Perusing the record, I could only find one judgment against which the first plaintiff is now appealing. It is obvious to me that the judgment was not a consent judgment.

In order to understand the nature of the present appeal, I have to identify what was the consent judgment referred to by the first plaintiff's counsel. From the notes of proceedings and the judgment of the learned judge, the consent judgment referred to by the plaintiff's counsel was a proposed settlement as per encl (37) (which in the judgment referred to as encl A) prepared by him which was tendered at the hearing in the High Court. This was the document which I have stated earlier could not be found in the appeal record. As such, it is difficult for me to determine what were the actual terms and conditions contained in that document, what more to decide whether the defendant had agreed to the terms and conditions.

From the notes of proceedings, the learned judge on 1 April 1996 recorded as follows:

> Encik Murthi:
>
> We have agreed to a consent judgment to be entered as per the statement of facts by solicitor George Proctor on liquidated damages for RM47,366.60 sen with interest. Judgment on liability as per prayer c & d Statement of Claim.
>
> All I have to do now is to assess quantum of damages as G Proctor in his affidavit 18 March 1996 has said she has not waived her rights (paras 5 & 6).

The response by the counsel for the defendant was recorded as follows:

> Mr Achan:
>
> I have 2 problems.
>
> Mr Proctor only served the affidavit on me on 29 March 1996. I have not been able to get instruction from my client.

> I just have to ask him about the discussion on the joint-venture. On the special damages I need a short adjournment, if my client persists I have to discharge myself.

Apparently, the learned judge refused the application for an adjournment to another date but allowed the defendant's counsel a few hours to get the necessary instructions from the defendant. As a result of that, when the case continued in the afternoon, the counsel for the defendant informed the court that the defendant did not agree to the terms of the settlement as per encl (37) and the counsel discharged himself from acting for the defendant. The court then adjourned the matter to another date for the defendant to retain another solicitor.

When this matter came up for continuation before the learned judge, the new counsel for the defendant, Mr Murali, informed the court that the defendant did not agree to the settlement as proposed by the counsel for the plaintiffs. The defendant's counsel also refused to admit liability in respect of reimbursements as stated in encl (37) by the plaintiffs' counsel. In other words, neither the defendant nor the counsel for the defendant agreed to the settlement as proposed by the counsel for the plaintiffs as per encl (37), what more to have it recorded as a consent judgment. It is also clear to me that the defendant's former counsel did not consent to encl (37) be recorded as a consent judgment. The former counsel only stated that he wanted confirmation from Mr Proctor that the defendant had agreed to reimburse the first plaintiff for the amount that she had paid in respect of conversion, drainage and irrigation fees and the quit rent (hereinafter referred to as 'that amount'). The court then requested the plaintiffs' counsel to get an affidavit from Mr Proctor. Mr Proctor then filed an affidavit dated 18 March 1996 (hereinafter referred to as 'the affidavit'). I have narrated above what happened after the affidavit was filed.

It is clear to me that the defendant and his present counsel did not at any time agree to encl (37) to be a settlement what more to have it recorded as a consent judgment. The learned judge, after hearing the parties refused to record encl (37) as a consent judgment and ordered a full trial. The first plaintiff appealed against that decision. As such, for all intents and purposes, there was no consent judgment being recorded. It was wrong for the plaintiffs' counsel to refer to encl (37) as a consent judgment. In my view, encl (37) is nothing more than a proposed settlement by the plaintiffs which was never accepted by the defendant.

Before us, the plaintiffs' counsel submitted that the learned judge have erred in rejecting the consent judgment (the proposed settlement as found in encl 37) because the affidavit of Mr George Proctor dated 18 March 1996 clearly shows that the defendant have agreed to reimburse the first plaintiff in respect of payments advanced by the first plaintiff. The affidavit, inter alia, stated as follows:

> 3 Vide a Sale & Purchase Agreement dated 9 September 1988, the plaintiff abovenamed sold their interest in land held under EMR 2155 Lot 1189 Mukim & District of Klang to Palm Grove Development Sdn Bhd for a consideration of RM550,000 and upon the terms stated therein.

4 I confirm that the sum of RM17,408 being conversion fee, the sum of RM9,000 being Drainage and Irrigation fee and the sum of RM8,694 being quit rent have not been reimbursed to the first plaintiff from the proceeds of Sale received from Palm Grove Development Sdn Bhd.

5 The first plaintiff when executing the Agreement dated 9 September 1988 with Palm Grove Development Sdn Bhd had at no time agreed to accept the proceeds of sale of the land held under EMR 2155 in full and final settlement of all claims against the defendant.

6 In fact vide an Agreement dated 9 September 1988 between the plaintiff and the defendant, it was the second plaintiff who had agreed at Clause 1 thereof that out of the sum due to him from Palm Grove Development Sdn Bhd a sum of RM137,500 could be deducted and paid to the defendant. At no time had the first plaintiff in any of those Agreements agreed to waive her claim against the defendant for the Conversion Drainage and Irrigation fee etc.

The above passages stated that the first plaintiff had expended the sum of RM26,408 for conversion, drainage and irrigation fees and RM8,694 for quit rent and assessment. The first plaintiff did not waive her right for reimbursement for that amount from the defendant. As such she would not accept her half share of the proceeds of RM550,000 as full settlement of her share. The first plaintiff also did not agree that out of the RM550,000, the defendant be paid the sum of RM137,500 as his share of the sale proceeds. The first plaintiff reserved her right to claim for reimbursement. Only the second plaintiff agreed that the sum of RM137,500 be paid to the defendant from the proceeds of the sale and the first plaintiff is not bound by the concession made by the second plaintiff. I could not find anywhere in the affidavit to show that the defendant had agreed or conceded to reimburse the first plaintiff in respect of that amount.

Mr George Proctor at para 4 merely stated that the amount sums paid by the first plaintiff have not been reimbursed in full from the proceeds of the sale. That is all the verification that Mr Proctor made. This, in my view, was not an agreement on the part of the defendant to reimburse the first plaintiff in respect of that sum. It is obvious to me that the plaintiffs' counsel had erred when he said that the affidavit shows that the defendant had agreed to reimburse the first plaintiff. Reading the affidavit as a whole, I could not find anywhere that the defendant had agreed or gave an indication to pay that amount to the first plaintiff. The plaintiffs' counsel was in error when he stated in this court and the court below that there was a settlement between the parties, what more to call it a consent judgment. The only reason I could think of as to why the plaintiffs' counsel was insistent that the affidavit shows that the defendant had agreed to reimburse that was nothing more than to tie the hands of the defendant, and it was a misnomer on the part of the plaintiffs' counsel in his submission to refer to encl (37) as a consent judgment. Even though it was pointed out to him that we could not find any consent judgment, the insistence of the plaintiffs' counsel in calling encl (37) as a consent judgment is nothing more than to mislead the court.

After hearing the parties and perusing the record of appeal, I am of the view that the learned judge was right when in the judgment at p 5 she stated:

> Now, when enclosure (37) was tendered to me on 25 January 1996 I did not make any order at all, as the matter was adjourned for mention to another date to enable Mr G Proctor to file his affidavit. As such it is my considered opinion that there was no Consent Order ...

Before us, the plaintiffs' counsel submitted that the learned trial judge was in error in refusing to record encl (37) as consent judgment and he cited the case of *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381 where it was held that the consent order is binding on both parties, whether or not the parties expressly authorize their counsel as to the terms of the consent order. In that case, there was a consent judgment entered earlier between the parties in respect of access to the child by the plaintiff. Contrary to the consent order, the defendant on several occasions, refused the plaintiff to have access to the child. The plaintiff then took up committal proceedings against the defendant. The defendant in resisting that committal proceedings claimed that she did not agree to the terms and conditions of the consent order. The terms and conditions were agreed upon by her former solicitors without consulting her. In his judgment at p 385, Hishamuddin J said:

> However, I shall first decide on two points of law that have been raised by learned counsel for the defendant, Encik Tan Beng Hong. The first issue is whether the defendant is bound by the consent order as she had never, in the first place, authorized her former counsel, Encik See, to agree to the consent order. With respect, on this issue, I agree with the submission of the learned counsel for the plaintiff, Encik CE Chuah, that it is irrelevant whether or not Encik See, in agreeing to the consent order, had acted in accordance with the defendant's instruction or otherwise. Assuming that it is true that the defendant had never authorized her former counsel Encik See, to agree to the consent order, that, however, is a problem to be thrashed out only between the defendant and her counsel; such lack of authorization cannot affect the interest of a third party — the plaintiff. It is a principle of law that a party is entitled to rely on the apparent authority of the counsel of the opposing party to compromise: *Wough v HB Clifford & Sons Ltd* [1982] 1 All ER 1095. Therefore, Encik See, being the defendant's duly appointed counsel at the material time, had the apparent authority to compromise and the plaintiff's counsel was entitled to rely on such ostensible or apparent authority when agreeing to the consent order.

That case could easily be distinguished from the present appeal. There was a consent order entered earlier by the court. The defendant in that casein trying to justify her action to deny the plaintiff access to the child said she did not agree to the terms and conditions of the consent order. The judge in that case held that she was bound by the terms and conditions of the consent order that were agreed upon by her solicitors. In the present appeal, there was no consent order made whatsoever, only that the plaintiffs' counsel insisted in calling encl (37) as consent order. I agree with the learned trial judge that the case of *Leow Seng Huat* is not relevant in the present appeal.

As can be seen from that case, there was a consent judgment entered earlier, and that is not the case in the present appeal. Once a consent judgment is entered, it would be binding on both parties even though it was entered by the counsel duly appointed without the instruction of one of the

parties. In the present appeal, not only there was no consent order entered earlier, but the learned counsel for the defendant withdrew from representing the defendant when the defendant refused to follow instructions from him. As such, that case, as the learned trial judge said, was not relevant to the present appeal. A

The plaintiffs' counsel also referred to the decision in *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705. In that case the appellant entered into two master agreements with the first respondent for credit facilities. For the due performance of the first appellant's obligations the second and third respondents executed two master agreements. The appellant being dissatisfied with the guarantees given by the second and third respondents requested for additional security to be given. The respondents provided a novation letter as the additional security. The appellant then filed an action against the respondents to recover the sum due under the agreements. The respondents in their defence claimed that the two guarantees were void for uncertainty. In the alternative, the respondents submitted that the two agreements were superseded by the novation letter. At the trial, both counsel agreed that the issue of 'whether the guarantees were void for uncertainty' be decided as a preliminary issue first. After hearing the parties, the learned judge ruled that the guarantees were not void for uncertainty and the guarantors were liable and the only issue remaining was the quantum payable to the appellant. A joint application was then made for time to settle the claim. It could be inferred from the above that the respondents had accepted liability and were now negotiating on quantum. However, the respondents' counsel subsequently contended that only the issue of the validity of the guarantees had been decided but not the issue of the novation letter and that the respondents should therefore be permitted to call evidence in respect of the novation letter. The trial judge allowed the respondents' application. On appeal, the Court of Appeal held that both counsel in that case had consented to proceed in a particular manner. An order made by consent in the absence of fraud could only be varied by consent. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost. B C D E F

In my view, that case could be distinguished from the present appeal. In that case, counsel of both parties agreed that the issue of the validity of the guarantees be decided first by the court. The court then heard the parties in respect of that issue and made a ruling in that the guarantees were valid and that the issue left was the quantum. In the present appeal, the plaintiffs' counsel attempted to have encl (37) be recorded as a consent judgment but on the objection of the defendant, the learned trial judge refused to record encl (37) as consent judgment and instead made a ruling that there would be a full trial. In my view, the plaintiffs could not now come to this court to insist that the court below change its view and record encl (37) as consent judgment. That is, in my view, within the discretion of the learned judge which I would not like to disturb. G H

The learned judge, in my view, was within her right in refusing to record encl (37) as consent judgment. In my view, the learned judge would be in error if she had acceded to the plaintiffs' counsel's request to have that I

A enclosure be recorded as consent judgment when there were sufficient evidence to show that the defendant and his counsel objected to it. I am of the view, the learned judge was right when she said that this was an attempt by the plaintiffs' counsel to dictate the terms and procedure of the trial which is not permitted by *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486 where it was held:

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> The control of proceedings was always a matter for the trial judge and the parties were not entitled as of right to have their case tried to a conclusion in such manner as they thought fit and if necessary after all the evidence had been adduced and could have no legitimate expectation that such a course would be followed. A party's only legitimate expectation was that he would receive justice, which could only be achieved by assisting the judge and accepting his rulings.

C

For the above reasons, I agree with my learned brother, Mohd Saari Yusoff, JCA that there is no merit in this appeal and the appeal should be dismissed. By majority decision, the appeal is hereby dismissed with costs. The deposit is to be paid to the respondent to account of taxed costs.

D

Mohd Saari JCA: This is a claim for breach of contract. In the court below, the learned judge ruled that there was no consent order in full force as alleged by the plaintiffs, whereupon the first plaintiff appeals ('the appellant').

E The salient facts of the case is as follows. The appellant was the joint owner of land held under EMR 2155 for lot No 1189 in the Mukim and District of Klang ('the said land'). On 17 December 1974, she entered into a joint venture agreement ('JVA') whereby the respondent would develop the said land into housing estate. With the proposed housing project in mind, the appellant advanced payments in respect of the following items:

F

(a)	Conversion fee	RM17,408
(b)	Drainage and Irrigation fee	RM 9,000
(c)	Assessment	RM12,264
(d)	Quit rent	RM 8,694
		RM47,366

G

But the respondent failed to develop the said land. Later, upon termination of JVA by the appellant and upon obtaining consent from the respondent, the said land was sold to a third party for RM550,000.

H The issue for determination is whether there was a consent order in full force as alleged by the appellant.

From the appeal record, It is noted that on 25 January 1996, MS Murthi, learned counsel for the appellant, informed the court that the parties had reached a settlement. The terms of settlement is embodied in

I appendix A (encl 37) which reads as follows:

> 1 Mr George Proctor the solicitor acting as solicitor for all parties in the Sale & Purchase of the land held under EMR 2155 of 1189 Mukim and

District of Klang to Palm Grove Development Sdn. Bhd. Is directed to file an affidavit to state:

(a) Whether or not the sum of RM17,408 for conversion fee, the sum of RM9,000 for Drainage and Irrigation fee, the sum of RM8,694 for quit rent have been reimbursed to the first plaintiff from the proceeds of the Sale received from Palm Grove Development Sdn Bhd.

(b) Whether or not the first plaintiff had at the time of the execution of the Sale & Purchase to Palm Grove Development Sdn Bhd of the land held under EMR 2155 Lot 1189 Mukim and District of Klang agreed with the defendant to accept her option of the proceeds of sale, in full and final settlement of all claims against the defendant.

(c) The parties have agreed to be bound by the statement of facts as deposed to by the said solicitor George Proctor on the 2 issues as set out above and to enter Judgment accordingly.

(d) In the event the said solicitor George Proctor falls, neglects or refuses to affirm an affidavit as required by the Consent Order above, the parties shall be at liberty to issue a subpoena to compel the said solicitor to give evidence in Open Court.

It may be noted that in para 1(c) of the Appendix A, the parties agreed to be bound by the affidavit of George Proctor which had not been filed. After appendix A was tendered, the case was adjourned to 1 April 1996 to give time for George Proctor to file affidavit referred to in appendix A. However, on 1 April 1996, dispute arose as to whether appendix A and the affidavit were binding on the parties. The case was further adjourned to 1 November 1996 for parties to make submission. On 1 November 1996, after hearing submission of both parties, the learned judge made the following finding:

> Now, when Enclosure (37) was tendered to me on 25 January 1996 I did not make any order at all, as the matter was adjourned for mention to another date to enable Mr G Proctor to file his affidavit. As such it is my considered opinion that there was no Consent Order made at all. Thus after hearing the submission by both counsel on 1 November 1996, I made a ruling on 27 November 1996 for this case to proceed to trial and for both parties to call their respective witnesses.

In this written submission, MS Murthi cited the case of *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705. In that case, the court made an order by consent. There, in the court of first instance permission was granted for the respondents to call evidence on novation. But the ruling was reversed by the appellate court on the ground that the respondents were bound by the consent order. Clearly, the facts in that case was distinguishable. Here, from the notes of proceeding, there was nothing to suggest that terms of settlement was recorded and pronounced by the court.

In the premise and for reasons alluded above, my finding on this issue is in the negative. Hence, I dismiss the appeal with costs.

Appeal dismissed.

Reported by Lim Lee Na